

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 5**

IN THE Matter of)	
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ENVIROSAFE SERVICES OF)	A Proceeding Pursuant to
OHIO, INC.)	40 C.F.R. § 300.440(d)
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_____)	

**DECISION UPON RECONSIDERATION OF DETERMINATION OF UNACCEPTABILITY
TO RECEIVE CERCLA WASTE**

This matter is before the Regional Administrator for Reconsideration of the Determination of Unacceptability made by the United States Environmental Protection Agency, Region 5 (U.S. EPA), that, pursuant to the Off-Site Rule, 40 C.F.R. § 300.440, the Oregon, Ohio facility of EnviroSAFE Services of Ohio, Inc. (Envirosafe) has conditions which render the facility unacceptable for the receipt of off-site wastes generated as a result of removal or remedial activities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* By letter dated November 12, 1998, Region 5 informed EnviroSAFE that the Oregon facility would be unacceptable to receive CERCLA wastes sixty days from receipt of the notice unless certain conditions were satisfied.

The purpose of the Off-Site Rule is to avoid having CERCLA wastes from response actions authorized or funded under CERCLA contribute to present or future environmental problems by directing these wastes to management units determined to be environmentally sound (preamble to Off-Site Rule 58 FR 49200, 49201, Sept. 22, 1993). The regulation requires that CERCLA wastes may only be placed in facilities operating in compliance with the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, or other applicable federal or state requirements. Under the Off-Site Rule, a facility's acceptability to receive CERCLA wastes is based upon compliance and release determinations. A compliance determination requires the finding of no relevant violations of applicable requirements at or affecting receiving units. With variations, an absence of release determination requires a finding of no uncontrolled significant releases from any unit.

As CERCLA cleanups are generally ordered or funded by U.S. EPA, an off-site determination is U.S. EPA's business decision as to where CERCLA wastes under U.S. EPA's control should be sent. (58 FR 49206).

Procedural Background

The Determination of Unacceptability issued by U.S. EPA in this matter was based upon the issuance of a Notice of Violation (NOV) by the Ohio Environmental Protection Agency (OEPA). The OEPA NOV listed 14 alleged regulatory violations observed during a June 1998 inspection.¹ As provided at 40 C.F.R. § 300.440(d)(4), EnviroSAFE requested an informal conference with representatives of U.S.

¹ EnviroSAFE and OEPA are currently litigating the validity of the NOV before the Ohio Environmental Review Appeals Commission.

EPA. Based upon a meeting between the parties and the submission of additional information, U.S. EPA determined that for purposes of the Determination of Unacceptability, 10 of the 14 violations had been resolved. However, due to the continued existence of four violations, U.S. EPA, Region 5, determined that EnviroSAFE remained unacceptable to receive CERCLA wastes.

In conformity with the further appeals process found at 40 C.F.R. § 300.440(d)(7), EnviroSAFE requested reconsideration of the Determination of Unacceptability by the Regional Administrator. Pursuant to 40 C.F.R. § 300.440(d)(8), EnviroSAFE also requested a stay of the effective date of the determination. The matter was assigned to the Regional Judicial Officer and the effective date of the notification was extended until June 1, 1999. A meeting with the RJO was held on March 23, 1999. Based upon discussions at the meeting, the parties resolved two of the four outstanding allegations of violation contained in the OEPA NOV. As a further consequence of the discussions at the meeting, U.S. EPA determined that the third outstanding alleged violation, involving failure to make a hazardous waste determination, was, by itself, not enough to support an unacceptability determination. Therefore, for purposes of the Determination of Unacceptability, there is one unresolved allegation of violation contained in the OEPA NOV.

Allegation of Violation

The OEPA NOV alleges that a sump located outside the Oregon, Ohio facility containment building must satisfy the specific tank requirements found at Ohio Administrative Code 3745-66-92 *et seq.* The sump is utilized in connection with EnviroSAFE's truck decontamination activities.

The containment building is used for the treatment of regulated KO61 hazardous waste at the Oregon facility. The building was constructed and is operated pursuant to a RCRA Part B permit issued by Ohio. One of the components of the treatment process requires decontamination of trucks to ensure that all KO61 dust is captured and managed at the facility. Due to limitations in the equipment used to off-load over-the-road equipment, incidental waste can be minimized but not entirely eliminated. The truck tire decontamination area is designed to address this problem. The truck tires are washed in this area and the water is collected in the sump basin for disposal. The truck tire decontamination area is constructed in two sections: an asphalt-paved entrance driveway leading to concrete aprons outside the doors. This design contains dirt, waste liquids and rainfall that may come in contact with the apron areas as a result of normal operations and weather conditions. The aprons are 60 feet long and placed around a centrally located blind sump equipped with a steel grate. The concrete is sloped toward the sump so that extraneous dirt, waste liquids and rainfall will travel toward the sump and be collected. The areas under the concrete aprons are lined with the HDPE liner system used under the containment building floor.

The sump has a 593 gallon capacity. EnviroSAFE estimates that the trough leading to the sump is 28 feet long by 3 feet by 18 inches. Per Ken Humphrey, EnviroSAFE Director of Environmental Compliance, the sump basin is generally empty and the majority of water collected in the sump holding bin is rainwater. As required by its Part B RCRA permit, EnviroSAFE must empty the sump daily. Mr. Humphrey estimates that the sump generates between 200 and 500 gallons of waste liquid each year.

I note that all parties agree as to the facts in this matter. OEPA and U.S. EPA allege that the sump is operating as a tank and must meet the more stringent tank requirements. EnviroSAFE argues that 1) the sump is not a tank, 2) the sump has been permitted by the State of Ohio in its Part B RCRA permit and that EnviroSAFE is operating in compliance with its permit, and 3) the violation is not "relevant"

for purposes of the Off-Site Rule.

Relevance of the Violation

Assuming that a violation exists, for the Off-Site Rule to be applied, the violation must be “relevant.” 40 C.F.R. § 300.440(b)(1)(ii) defines “relevant” broadly, stating:

Relevant violations include significant deviations from regulations, compliance order provisions, or permit conditions designed to: ensure that CERCLA waste is destined for and delivered to authorized facilities; prevent releases of hazardous waste hazardous constituents, or hazardous substances to the environment; ensure early detection of such releases; or compel corrective action for releases.

Pursuant to the preamble of the Off-Site Rule, determinations of whether a violation is “relevant” for purposes of the Off-Site Rule should be made on a case-by-case basis. (58 FR 49208). The preamble refers to the RCRA Enforcement Response Policy, (OSWER Directive No. 9900.0-1A), to determine the relevance of a RCRA violation, and generally states that a Class I violation should be considered a relevant violation. While the guidance has been superseded, for historical perspective, it should be noted that Class I violations represented the most egregious RCRA violations and were to be dealt with swiftly and forcefully (58 FR 48224).

To determine relevance, it still remains appropriate to use the three criteria set forth in the Off-Site Rule preamble. The criteria, formerly used for RCRA Subtitle C facilities, are:

1. The significance of the requirement that is being violated;
2. The extent of the deviation from the requirement; and
3. The potential or actual threat to human health or the environment. (53 FR 48224).

As a general statement, the operation of a tank without meeting the hazardous waste tank system standards is a significant deviation from regulations. Both the federal and state hazardous waste tank system standards are designed to prevent the migration of hazardous waste or accumulated liquid into the environment. Secondary containment is a critical component of a tank system management plan for achieving this protection. It provides the most reliable and fail-safe method of protecting the environment from hazardous waste spills, leaks or accumulated liquids. The standards regulating sumps do not require secondary containment and are, therefore, not as stringent. However, even as to the tank requirements, U.S. EPA has recognized the need for certain flexibility. As noted in a November 30, 1989 letter from Sylvia Lowrance, Director, Office of Solid Waste to Mr. Al Patton, C-K Associates, on the federal level, on a case-by case basis, U.S. EPA may allow for the use of operational controls, (e.g. using pumps as a means of achieving secondary containment) in lieu of secondary containment.

I leave open to the OEPA/Envirosafe litigation the determination of whether this system must meet the tank or sump requirements found in the Ohio Administrative Code. I note that Envirosafe has

constructed the containment building in conformity with its Ohio RCRA Part B permit. The design and operation specifications for the containment building and sump were reviewed by OEPA. However, Ohio regulations do not protect a facility acting in compliance with its permit from further enforcement action. Ohio regulations contain no "permit as a shield" defense similar to 40 C.F.R. § 270.4.

Evaluating the entire record, for the purposes of this Off-Site Redetermination, I believe that Envirosafe has made a creditable showing that the alleged violation is not relevant for purposes of supporting the Agency's unacceptability determination. As it currently operates, the sump does not appear to threaten human health or the environment. The yearly quantity of liquid collected in the sump, between 200 and 500 gallons, is small. Water collected in the sump basin is removed daily. The sump does not receive liquids on a regular basis. The collected liquids include rainwater. The record contains no allegation of release or potential release. Given the specific facts of this case, I do not find that this alleged violation supports a determination of unacceptability to receive CERCLA wastes.

Conclusion

The Envirosafe Services of Ohio, Inc. facility located in Oregon, Ohio may continue to receive CERCLA wastes.

Date: May 28, 1999

/S/
Francis X. Lyons
Regional Administrator

Prepared by Regina Kossek, Regional Judicial Officer

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